APPENDIX

THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

[PUBLIC—No. 333—74TH CONGRESS]

AN ACT

To provide for control and regulation of public-utility holding companies, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Public Utility Act of 1935."

TITLE I—CONTROL OF PUBLIC-UTILITY HOLDING COMPANIES

NECESSITY FOR CONTROL OF HOLDING COMPANIES

SECTION 1. (a) Public-utility holding companies and their subsidiary companies are affected with a national public interest in that, among other things, (1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a large number of investors in different States; (2) their service, sales, construction, and other contracts and arrangements are often made and performed by means of the mails and instrumentalities of interstate commerce; (3) their subsidiary public-utility companies often sell and transport gas and electric energy by the use of means and instrumentalities of interstate commerce; (4) their practices in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage; (5) their activities extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies.

(b) Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to H. Res. 59 (Seventy-second

Congress, first session) and H. J. Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is hereby declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected—

(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts; when such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utility companies; when such securities are issued by a subsidiary public-utility company under circumstances which subject such company to the burden of supporting an overcapitalized structure and tend to prevent voluntary rate reductions;

(2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; when service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States;

(3) when control of subsidiary public-utility companies affects the accounting practices and rate, dividend, and other policies of such companies so as to complicate and obstruct State regulation of such companies, or when control of such companies is exerted through disproportionately small investment;

(4) when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties; or

(5) when in any other respect there is lack of economy of management and operation of public-utility companies or lack of efficiency and adequacy of service rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital.

(c) When abuses of the character above enumerated become persistent and wide-spread the holding company becomes an agency which unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title.

DEFINITIONS

SEC. 2. (a) When used in this title, unless the context otherwise requires—

(1) "Person" means an individual or company.

(2) "Company" means a corporation, a partnership, an association, a joint-stock company, a business trust, or an organized group of persons, whether incorporated or not; or any receiver, trustee, or other liquidating agent of any of the foregoing in his capacity as such.

(3) "Electric utility company" means any company which owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale, other than sale to tenants or employees of the company operating such facilities for their own use and not for resale. The Commission, upon application, shall by order declare a company operating any such facilities not to be an electric utility company if the Commission finds that (A) such company is primarily engaged in one or more businesses other than the business of an electric utility company, and by reason of the small amount of electric energy sold by such company it is not necessary in the public interest or for the protection of investors or consumers that such company be considered an electric utility company for the purposes of this title, or (B) such company is one operating within a single State, and substantially all of its outstanding securities are owned directly or indirectly by another company to which such operating company sells or furnishes electric energy which it generates; such other company uses and does not resell such electric energy, is engaged primarily in manufacturing (other than the manufacturing of electric energy or gas)

and is not controlled by any other company; and by reason of the small amount of electric energy sold or furnished by such operating company to other persons it is not necessary in the public interest or for the protection of investors or consumers that it be considered an electric utility company for the purposes of this title. The filing of an application hereunder in good faith shall exempt such company (and the owner of the facilities operated by such company) from the application of this paragraph until the Commission has acted upon such application. As a condition to the entry of any such order, and as a part thereof, the Commission may require application to be made periodically for a renewal of such order, and may require the filing of such periodic or special reports regarding the business of the company as the Commission may find necessary or appropriate to insure that such company continues to be entitled to such exemption during the period for which such order is effective. The Commission, upon its own motion or upon application, shall revoke such order whenever it finds that the conditions specified in clause (A) or (B) are not satisfied in the case of such company. Any action of the Commission under the preceding sentence shall be by order. Application under this paragraph may be made by the company in respect of which the order is to be issued or by the owner of the facilities operated by such company. Any order issued under this paragraph shall apply equally to such company and such owner. The Commission may by rules or regulations conditionally or unconditionally provide that any specified class or classes of companies which it determines to satisfy the conditions specified in clause (A) or (B), and the owners of the facilities operated by such companies, shall not be deemed electric utility companies within the meaning of this paragraph.

(4) "Gas utility company" means any company which owns or operates facilities used for the distribution at retail (other than distribution only in enclosed portable containers, or distribution to tenants or employees of the company operating such facilities for their own use and not for resale) of natural or manufactured gas for heat, light, or power. The Commission, upon application, shall by order declare a company operating any such facilities not to be a gas utility company if the Commission finds that (A) such company is primarily engaged in one or more businesses other than the business of a gas utility company, and (B) by reason of the small amount of natural or manufactured gas distributed at retail by such company it is not necessary in the public interest or for the protection of investors or consumers that such company be considered a gas utility company for the purposes of this title. The filing of an

application hereunder in good faith shall exempt such company (and the owner of the facilities operated by such company) from the application of this paragraph until the Commission has acted upon such application. As a condition to the entry of any such order, and as a part thereof, the Commission may require application to be made periodically for a renewal of such order, and may require the filing of such periodic or special reports regarding the business of the company as the Commission may find necessary or appropriate to insure that such company continues to be entitled to such exemption during the period for which such order is effective. The Commission, upon its own motion or upon application, shall revoke such order whenever it finds that the conditions specified in clauses (A) and (B) are not satisfied in the case of such company. Any action of the Commission under the preceding sentence shall be by order. Application under this paragraph may be made by the company in respect of which the order is to be issued or by the owner of the facilities operated by such company. Any order issued under this paragraph shall apply equally to such company and such owner. The Commission may by rules or regulations conditionally or unconditionally provide that any specified class or classes of companies which it determines to satisfy the conditions specified in clauses (A) and (B), and the owners of the facilities operated by such companies, shall not be deemed gas utility companies within the meaning of this paragraph.

(5) "Public-utility company" means an electric utility company or a gas utility company.

(6) "Commission" means the Securities and Exchange Commission.

(7) "Holding company" means—

(A) any company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-utility company or of a company which is a holding company by virtue of this clause or clause (B), unless the Commission, as hereinafter provided, by order declares such company not to be a holding company; and

(B) any person which the Commission determines, after notice and opportunity for hearing, directly or indirectly to exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this title upon holding companies.

143–148). Each of these twelve defendants is shown itself to be guilty of violations which oblige it to register as a holding company *in its own right*. Such violations and such duty to register are quite independent of the fact that these twelve defendants are subsidiaries of Bond and Share. None of these twelve defendants, other than American Gas, is alleged to be engaged in the performance of service contracts. Hence none of them, other than American Gas, is alleged to violate section 4 (a) (2) relating to service contracts.

In its brief on the constitutionality of the registration provisions in the Bond and Share suits (pp. 108–118), the Government expressly points out that its case does not turn, as respondents mistakenly inform this Court, upon any disregard of the corporate entities in the Bond and Share system. As the Government there states (pp. 108–109):

> The attempt is constantly made to confuse the question now being considered by saying that the corporate entities of the companies in the Bond and Share system cannot be disregarded, and for that reason the Congress may not validly regulate in any degree whatever the action of the holding-company defendants. But the question of disregarding or piercing the corporate entity is not in any way involved in the question now before this Court. Whether

> or not the holding-company defendants would be liable for the torts committed by their subsidiaries, or would be liable upon contracts made by their subsidiaries, or could validly be served by process upon a subsidiary, is not involved in this case. Had the Congress merely provided that a holding company must register if it does certain acts, then a court in a given case might be called upon to decide whether it ought to disregard the corporate fiction when the holding company is shown to do the acts through a subsidiary company. The Congress has avoided this difficulty by the express inclusion in the statute of section 4 (a) (6).

The respondents assert that the Government treats the Bond and Share companies as a single clan. But the Government treats the Bond and Share companies no more as a single clan that it does any other group of companies in a single holding-company system as defined by section 2 (a) (9) of the Act. And the respondents cannot deny that they and their companies each constitute a holding-company system as defined by the Act. And as we have shown (see the Government's principal brief in the cases at bar, pp. 58–59), this issue of control is the same in the Bond and Share suits as it would be in respondents' suits. On page 62 of its Factual Brief in the Bond and Share suits, the Govern-

ment points out that a holding company is distinguished from an investment company by the control it is in a position to exercise over its subsidiaries.[1] The Government further states on page

[1] In support of this assertion the Government quotes in a footnote, pp. 63–64, from the communication of the President of the respondent American Water Works and Electric Company to the Chairman of the House Committee on Interstate and Foreign Commerce, under date of March 30, 1935, to the following effect:

"Investment trusts are based upon the principle of diversification of risk, and they carry that diversification far beyond any possibilities open to the utility holding companies. They buy, sell, or hold Government and municipal bonds, listed securities, the bonds, debentures, and preferred stocks and common stocks of railroads, utilities, manufacturing companies, and chain and department stores, scattered throughout many industries and sections of the country. Those that invest in unlisted securities at all do so only in exceptional and minor instances. Because their investments are so widely diversified among industries and companies it is impossible for them to provide management for the companies in which they own securities, and because they confine themselves mainly to the purchase of listed securities and minority interests; they do not need management control of the companies whose securities they buy. If they lose confidence in the management of a company in which they are interested, they have a ready market for such of its securities as they may own, and they can sell them with only such loss as open market conditions may require.

"But from the very nature of the case a utility holding company cannot thus protect itself, and it must therefore have the power to insure efficient management of the operating companies in its system. In order to perform its necessary function of providing the junior capital for the oper-

8 of the same brief: "A holding company may exercise control which its voting-stock ownership in another company gives it in divers ways and by divers metehods. If control exists, its frank avowal, as an essential ingredient of holding-company management is preferable to its subtle concealment. The existence of control may be of much greater significance than the particular form of its exercise."

Respondents have never failed to assert their control over their subsidiaries, even in the instant proceedings, when they found it advantageous so to do.

Respondents have alleged that they are not entitled to the exemption from the Act to which they

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ating companies, it must buy and hold their common stocks, which in the main are not and cannot be listed, and therefore cannot be sold on the open market. To get the money to buy those common stocks it must sell its own securities. It cannot sell its own securities unless it can assure those who purchase them that it is so organized and conducted that it can at all times provide sound and efficient management for the operating companies whose junior securities it owns and must continue to own. It cannot insure such management without maintaining the voting control of its subsidiaries who may prove to be inefficient. In the utility business, just as in all other business, control must be vested in the owners who provide the junior capital. They take the principal risk and they will not take that risk unless they have the power to *control* the conduct of the business which they own and thus protect themselves as far as possible against loss." [Italics supplied.]

would be entitled under the terms of the Act if they did not control their subsidiaries (AR. 2–3, NR. 5–6). By such allegation respondents acknowledge their control over their subsidiaries in an effort to avoid being met with the contention that they have no standing to question the constitutionality of an Act which may never be applicable to them.

Furthermore, to meet the argument that two of their subsidiaries have brought suits in other jurisdictions, respondents assert that they *will bring* these two subsidiaries into their own cases if the petitioners wish them to do so. Respondents go further and assert that they *will also bring* in any other of their subsidiaries (respondents' brief, p. 73n). For such purposes respondents seem to be quite confident of their ability to control their own "clans."

For the English practice regarding the discretionary power of the trial court to grant a stay where the parties and issues are not identical, see

Amos v. *Chadwick,* L. R. 4 Ch. Div. 869 (1877);

Amos v. *Chadwick,* L. R. 9 Ch. Div. 459 (1878);

Bennett v. *Lord Bury,* 42 L. T. (N. S.) 480 (Common Pleas, 1880);

Colledge v. *Pike,* 56 L. T. 124 (1887);

Multiple Utilities Company, Ltd., v. *Souch*, 46 R. P. C. 402 (Court of Appeals, 1929).

Respectfully submitted.

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According to the New York Times of November 10, the Circuit Court of Appeals for the Third Circuit on November 9, "postponed indefinitely a hearing on appeals brought by the Pittsburgh Steel Company against rulings of the National Labor Relations Board."

Judge J. Warren Davis is quoted as saying: "It seems to me no use in indulging in mental acrobatics about this matter when the United States Supreme Court may settle everything for us in a very short time."